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ATTORNEY GENERAL OF WASHINGTON

Ecology Division
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January 21, 2014

Chaitna Sinha
Reservation Attorney
Confederated Tribes of the Colville Reservation
P.O. Box 150
Nespelem, WA 99155

RE: Agreement in Regards to the Odessa Subarea Special Study Between State of Washington and The Confederated Tribes of the Colville Reservation

Dear Ms. Sinha

Enclosed is an original of the Agreement between the Confederated Tribes of the Colville Reservation and the State of Washington with the original signature page of Maia Bellon for the Department of Ecology. The Department of Ecology will retain the other original that was executed by the parties.

If you have any questions, please do not hesitate to contact this office.

Sincerely,

ALAN M. REICHMAN
Assistant Attorney General
(360) 586-6748

AMR:JLD
Enclosure

cc w/enc: Derek Sandison

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**Agreement in Regards to the Odessa Subarea Special Study
Between the State of Washington and
The Confederated Tribes of the Colville Reservation**

1. INTRODUCTION AND PURPOSE

This is an Agreement between the Confederated Tribes of the Colville Reservation (“Colville Tribes” or “Tribes”), acting by and through its federally recognized governing body the Colville Business Council, and the State of Washington, acting by and through the Department of Ecology, Office of the Columbia River (“State” or “Ecology”). The Tribes and the State are the Parties to this Agreement. The purpose of this Agreement is to implement the Parties’ Agreement in Principle for the Odessa Subarea Special Study, executed on April 2, 2013 (“Odessa AIP”).

2. BACKGROUND FACTS AND ISSUES

As acknowledged in part in Section 1 of the AIP:

2.1. Pursuant to the State’s 2006 Columbia River Water Supply Development Act (Chapter 90.90 RCW), the Washington Department of Ecology’s Office of Columbia River has proposed to replace ground water currently used for irrigation within a portion of the Odessa Ground Water Management Subarea with surface water. The ground water replacement effort is being undertaken in conjunction with the Bureau of Reclamation (Reclamation) as part of the Odessa Subarea Special Study. The project that has resulted from the Odessa Subarea Special Study will provide Reclamation project replacement surface water for up to 70,000 acres of land that is currently irrigated under state- issued ground water rights (hereinafter “Odessa Project”). To be eligible for ground water replacement, lands must be within the existing boundaries of the Columbia Basin Project, and must be identified as the existing “place of use” for ground water in

the aforementioned state permits. The Odessa Subarea Special Study does not propose expansion of irrigated acreage.

2.2 As part of its budget for the 2013-2015 biennium, the State Legislature has appropriated funds from the Columbia River Water Supply Development Account for the purposes of implementing the Odessa Project. The Office of Columbia River has confined the State's involvement in the project to funding capacity improvements in Reclamation's East Low Canal and associated mitigation measures. Funding for and construction of pumping plants and pipelines to convey water from East Low Canal to irrigated acreage will be the responsibility of the East Columbia Irrigation District and irrigators.

2.3 In order for Columbia Basin Project water to be made available for ground water replacement under the Odessa Subarea Special Study, Reclamation must apply for, and Ecology must issue, a secondary use permit to enable surface water stored in Reclamation facilities under Reclamation's 1938 water right to be put to beneficial use for irrigation purposes on the land that is currently irrigated under state-issued ground water rights discussed in Section 2.1., above.

2.4 Under the Odessa Project and its associated environmental impact statement, no additional drawdown from Lake Roosevelt (the reservoir impounded by Grand Coulee Dam) is proposed. Water for ground water replacement will be stored in Reclamation's Banks Lake Reservoir.

2.5. The Colville Tribes have critical and fundamental sovereign and proprietary interests in the upper mainstem Columbia River, as well as in Lake Roosevelt and in any activities that affect its operations. The southern and eastern boundary of the Colville Reservation is "in the middle of the channel of the Columbia River," and the western boundary is "in the Okanogan River." Agreement of May 9, 1891 and Act of July 1, 1892, 27 Stat. 62.

2.6 Based on various federal executive orders, agreements, legislation, and legal opinions (including the Executive Order of July 2, 1872 that established the Colville Reservation, the Agreement of May 9, 1891, the Act of July 1, 1892, and the Interior Department Solicitor's Opinion of June 3, 1974), the Colville Tribes have had a long-standing understanding of its ownership of the beds of the Columbia and Okanogan Rivers within these Reservation boundaries. In general, the Colville Tribes are a major landowner along the upper Columbia, especially within current Reservation boundaries, and act as a primary manager and regulatory entity for lands and waters within Reservation boundaries. The Colville Tribes hold fishing rights in the Columbia and Okanogan Rivers all the way to the Canadian border. The Colville Tribes have established significant water rights within the Reservation for consumptive and instream fisheries purposes, and assert claims for analogous rights in the Colville Reservation boundary waters.

2.7 Nothing in this Agreement shall be construed as a sale, lease, assignment, or any type of transfer of any of the water rights of the Colville Tribes to the state of Washington or any other party. This Agreement does not diminish in any way the water rights of the Colville Tribes, nor does it limit, waive, or affect in any way the Tribes' water rights claims, now or in the future.

3. TERMS OF AGREEMENT

The Colville Tribes and the State, as the parties hereto, enter into this binding Agreement in full recognition and understanding of the following mutual commitments and conditions:

3.1. Tribes' Non Opposition to Odessa Project

Ecology desires that the Colville Tribes not oppose the Odessa Project, and this Agreement sets forth the manner in which some impacts to the Colville Tribes may be mitigated.

3.2. Power Revenue

The State of Washington will compensate the Colville Tribes for lost power revenue resulting from operations directly associated with the Odessa Project. The State will provide compensation in a mutually agreed upon amount of Four Million Two Hundred Fifty Thousand Dollars (\$4,250,000.00). The payment amount was calculated by determining the present value of the lost revenue stream over the 100-year life of the Odessa Project. Payment shall be made by Ecology to the Tribes in two installments. Ecology shall make a first payment in the amount Two Million One Hundred Twenty-Five Thousand Dollars (\$2,125,000.00) upon execution of this Agreement. Ecology shall make a second payment in the amount of Two Million One Hundred Twenty Five Thousand Dollars (\$2,125,000.00) after the expiration of the thirty day appeal period associated with Ecology's issuance of a decision and report of examination on Reclamation's application for a secondary use permit to carry out the Odessa Project, described in Section 2.3., above, if the Tribes do not file any appeal,. An appeal of Ecology's issuance of a decision and report of examination by a party other than the Tribes shall not excuse Ecology from its obligation to make the second payment. While the intent of this provision is to provide the Tribes with adequate compensation for its lost power revenue due to the Odessa Project, the Parties recognize that it is difficult to calculate the value of power over a hundred year period. Accordingly, the Parties agree that if at any time the Colville Tribes make a showing, based on data related to prices for power and other factors affecting the Tribes' power revenue, that the amount stated above does not reflect the Tribes' lost power revenue, the Colville Tribes may request to reopen negotiations with the State, and the State, if it is determined that such data supports the Colville Tribes' request, will enter into negotiations in good faith with the Colville Tribes, and will remain committed to ensuring the Colville Tribes receive adequate compensation for lost power revenue for the duration of the Odessa Project. In the course of any

such negotiations, the State will, in good faith, seek to provide further compensation to the Tribes if the amount stated above proves to be an undervaluation of lost power revenue, but any additional payment to the Colville Tribes would be subject to State legislative appropriation.

3.3. Compliance with Biological Opinions

If approved by Ecology, the secondary use permit to be requested by Reclamation for water diversions associated with the Odessa Project, described in Section 2.3 above, shall be conditioned to reflect protective conditions and/or mitigation measures stipulated by the NOAA Biological Opinion for the Odessa Subarea Special Study (Odessa BiOp). This includes funding of the chum salmon spawning and rearing project in the Odessa Subarea BiOp. If issued, the secondary use permit shall also require compliance with all State aquatic resource protection statutes and policies related to Lake Roosevelt Kokanee and other potentially affected species. Ecology shall include a condition in the report of examination and decision approving Reclamation's application for a secondary use permit that shall require Reclamation to provide notice to Ecology of the timing and extent of water diversions under the secondary use permit. This condition shall require Reclamation to: (1) no later than September 1, provide the timing and extent of all projected water diversions under the permit through the following June 30; and (2) no less than ten days prior to the commencement of water diversions, provide notice of the date(s) that Reclamation intends to commence diversions under the permit and the projected duration and extent of such diversions.. In addition, this condition shall require that, if the full quantity of water is not diverted during the month of October, then, by November 1, Reclamation shall provide a projection of the time(s) when it will make further diversion(s) of water. After Ecology receives such notice from Reclamation, Ecology shall expediently provide the notice to the Tribes.

3.4. Cultural Resources

Prior to commencing construction of the initial phase of the Odessa Project, Ecology's Office of Columbia River will enter into a contract with the Colville Tribes to fund a 1.0 full time equivalent (FTE) tribal staff cultural resource position during the active construction period, currently estimated to be two years. If the construction extends beyond two years, the contract will be amended and extended.

3.4 Cooperative Water Supply Development Planning

Ecology will collaborate with Reclamation and the Colville Tribes to update the May 2011 Memorandum of Understanding regarding water storage appraisal studies. The update will address planning and design of Colville Tribal water resource development activities and projects on the Colville Indian Reservation. In addition to the Five Hundred Thousand Dollars (\$500,000.00) already expended by Ecology for the Goose Lake and Ninemile Flats storage appraisal studies, Ecology will make available to the Tribes Five-Hundred and Thirty Thousand Dollars (\$530,000.00) for cooperative tribal water resource development activities and projects on the Colville Indian Reservation. To obtain funds for water resource activities and projects the Tribes shall make one or more proposals to Ecology that outline a scope of work and budget. This proposal shall be funded so long as the proposed budget is not clearly unreasonable, and is being utilized for purposes related to water development activities and projects on the Colville Indian Reservation. After Ecology accepts such a proposal, the Tribes and Ecology shall negotiate a contract specifying the scope of work, budgets, and deliverables for the activity or project. Funding shall not be unreasonably withheld, and the parties shall work cooperatively to resolve any disputes.

3.5 Kokanee Studies

Ecology's Office of Columbia River will collaborate with the Colville Tribes to identify studies and projects that would lead to improved Lake Roosevelt Kokanee spawning and rearing. Once a clearer understanding of the potential scope of any appropriate studies and projects has been achieved, a determination will be made as to whether such studies and projects would be eligible for funding under the criteria of Columbia River Development Account, or whether another funding source would need to be pursued. Actual funding of any studies or projects would be subject to appropriation by the State Legislature.

3.6 Ongoing Government-to-Government Consultation Federal Relationships

Ecology's Office of Columbia River, in coordination with Reclamation, will participate in an annual review meeting with the Colville Tribes regarding the Columbia River Project, Odessa Project, and associated river and reservoir operations. Topics to be addressed by both Reclamation and Ecology in the annual meeting would include, but not be limited to: (1) protocols for consultation, river temperature and flows; (2) Lake Roosevelt operations and elevations; (3) implementation of the FCRPS and the Odessa Subarea Special Study Biological Opinions; (4) implementation of this Agreement, including the timing and extent of diversions under the secondary use permit; and (5) the status of mitigation measures and actions required under this Agreement. Topics specific to Ecology would include, but not be limited to: information sharing regarding the status of existing and proposed Office of Columbia River projects as well as progress in meeting the Colville Tribes' water supply development needs.

4. MISCELLANEOUS TERMS

4.1. Term

This Agreement shall be in effect from the date of the last signature on the Agreement ("effective date") until it is terminated.

a. State Commitments and Termination by the Colville Tribes

Should the State fail to meet any of the financial and other commitments specified in Section 3 of this Agreement, the Colville Tribes may terminate this Agreement at its sole discretion thirty days after written notification to the State. Such written notice of termination shall be sent to:

State of Washington
Director
Department of Ecology
Olympia, WA 98504-7600

b. Termination by the State

If the Colville Tribes take action of any kind to prevent the implementation of the Odessa Project, the State may terminate this Agreement at its sole discretion thirty days after written notification to the Colville Tribes. Such written notice of determination shall be sent to:

Confederate Tribes of the Colville Reservation
Office of Reservation Attorney
P.O. Box 150
Nespelem, WA 99155

c. Mutual Termination.

The Parties may also mutually agree to termination of this Agreement. An agreement to terminate this Agreement shall not be binding unless it is in writing and signed by personnel authorized to bind each of the Parties.

4.2. Notice

Except as provided above regarding notice of termination, the program manager for each of the parties shall be responsible for, and shall be, the contact person for all communications, billings and payments regarding the performance of this Agreement. A party whose program

manager or address has changed will provide written notice of such change to the other party within 30 days of the change.

Confederated Tribes of the Colville Reservation
Environmental Trust Director
P.O. Box 150
Nespelem, WA 99155

State of Washington
Office of Columbia River Program Manager
Department of Ecology
Olympia WA 98504-7600

4.3. Dispute Resolution

In the case of any dispute and at the written request of a Party, each Party will appoint, within 10 calendar days of receipt of the written request, a knowledgeable responsible representative to meet and negotiate in good faith to resolve any dispute arising under this Agreement. The location, form, frequency, duration, and conclusion of these discussions will be left to the discretion of the representatives. Upon agreement of both Parties, the representatives may utilize other alternative dispute resolution procedures such as mediation or binding arbitration. To the extent permitted under existing law, the Parties may agree on venue for any adjudication of an arbitration decision.

4.4. Amendment

This Agreement may be amended at any time by mutual agreement of the Parties. Such amendment shall not be binding unless it is in writing and signed by personnel authorized to bind each of the Parties. No alteration or modification of any term of this Agreement shall be valid unless made in writing and signed by personnel authorized to bind each of the Parties.

4.5. Entire Agreement

This Agreement constitutes the entire agreement between the Parties regarding the subject matter of this Agreement, and supersedes all previous written or oral agreements between them regarding the subject matter of this Agreement. No other understandings, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or to bind the State or the Colville Tribes.

4.6. Successors and Assigns

This Agreement and each of the terms, provisions and covenants hereof shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and assigns. The above notwithstanding, none of the rights or duties hereunder may be assigned by either Party without the written consent of the other Party.

4.7. Authority to Execute

Each signer for the State and the Colville Tribes, by executing this Agreement represents and states that the signer has taken the necessary administrative and legal actions to procure the actual authority to bind the signer's principal.

4.8. Principle of Construction

This Agreement has been prepared jointly by the State and the Colville Tribes following negotiations between them. The State and the Tribes were represented by legal counsel of their choosing. It shall be construed according to its terms and not for or against the State or the Tribes.

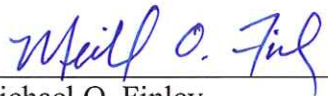
4.9. Governing Law and Venue

If the parties agree to utilize alternative dispute resolution as provide for in Section 4.3, this Agreement shall be governed by the laws of the United States, the State of Washington, and the Confederated Tribes of the Colville Reservation.


4.10 Liability

Each party shall be responsible for the actions and inactions of itself and its own officers, employees, and agents acting within the scope of their authority.

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION



Michael O. Finley
Chairman, Colville Business Council



Date

STATE OF WASHINGTON

Maia Bellon
Director, Department of Ecology

Date

4.10 Liability

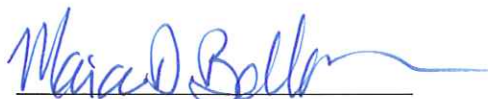
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CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

Michael O. Finley
Chairman, Colville Business Council

Date

STATE OF WASHINGTON



Maia Bellon
Director, Department of Ecology

1/10/24

Date